BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRECISE QUESTION NEVER DECIDED

The precise question as to recovery of civil damages by an oil jobber because of injury to its business and property growing out of the conspiracy for which defendant, with other major oil companies, was convicted (*United States vs. Socony-Vacuum Oil Company,* 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811) has never been decided by this Court.

The big general question may be divided into two parts:

1. Where a conspiracy or an illegal combination invades a free market and produces a wrongful price rise, takes an illegal exaction from a purchaser (particularly where the purchaser is tied to an *exclusive contract,* under which he has no voice as to purchase price), can the *purchaser* recover the *illegal exaction?*

2. Is it a *defense,* if proven, that the illegal exaction might have been or was "passed on to the retailer"? (254.)

These are the main questions involved in this appeal. *They have never been decided as to oil jobbers injured because of the conspiracy* for which the oil companies were convicted *in the Madison Cases.*

That oil jobbers sought the indictments of the major oil companies because they were being ruined is a matter of common knowledge. The indictment in the price-fixing case in Madison charged that the defendants "exacted large sums of money from thousands of jobbers" (37). Petitioner was *one* of such jobbers.

This Court has specifically held that for an *illegal exaction,* made possible because of a violation of the Sherman Law, there could be a recovery *(Chattanooga Foundry vs. Atlanta, supra).*

Here Petitioner, under its exclusive contract, bought

1,700,000 gallons of gasoline, was forced to pay 2¼ cents more per gallon for it because of the conspiracy and was damaged 1,700,000 x 2¼¢ on this branch of the case. Liability followed.

This Court has specifically held that "the law does not go beyond the first step," and the fact that the increase or illegal exaction might be "passed on to the retailer" (254) is *not* a defense. The cases will be referred to hereafter.

The Twin Ports Case was the first civil case tried wherein it was sought to recover damages in behalf of a jobber because of the conspiracy in *United States vs. Socony-Vacuum, supra.*

The jobber was tied down to an *exclusive* purchase contract. It had *nothing to say* about the *purchase price;* neither did it have anything to say about the price at which it *sold.* It did not seek, in this case, a recovery on a margin basis, so the retail price at Duluth was of no moment.

Important questions are here raised, also as to the construction of the Sherman Act and as to whether a *liberal* or *strict* rule exists as to damages in cases thereunder.

Also important are the questions as to *liberality* or *strictness* as to *pleading* under the New Rules of Civil Procedure for the United States District Courts.

The conspiracy as to margins as charged in the indictment in the jobber-contract case, commenced in 1931 (44, 51). The *effect* of this conspiracy, which had among other purposes that of *limiting and fixing margins,* was being felt by the jobbers from 1931 on. During the N. R. A. Code period the situation improved as to jobbers. The *Schecter Case,* 295 U. S. 495, 79 L. Ed. 1570, 55 Sup. Ct. 837, eliminated the Code. The Schecter Case was decided on May 27, 1935.

The Code was approved June 16, 1933. After the Code became operative and in 1934, the net profits of Petitioner

were $16,995.00 (141). In the year before, 1933, the net profits were only $1,519.00 (141).

As to just when the situation started to improve in 1933 under the Code the record is silent, but there was a big improvement so far as net earnings were concerned in 1934, when the net earnings were over $15,000.00 *more* than they were in 1933.

In 1935, *after the Code went out,* and in the *year of the buying programs* and the *conspiracy* made the basis of *this* action, instead of a net profit of $16,995.00, Petitioner suffered a *loss* of $1,348.00, a difference of $18,000.00.

The 1935 and 1936 illegal exactions and resulting losses occurred *after* the Code went out, when Petitioner could not get any better contract than the one it was operating under (150), and when Petitioner was tied up to the exclusive contract under which the evidence showed it could not live (150-151).

With the situation thus *becoming worse* the 1935 conspiracy came into being.

Petitioner kept up the losing struggle during 1935 and three months of 1936, hoping for the best. During all this time it paid the illegal exaction of 2¼¢ per gallon.

There was a gradual loss of profits every year from 1931 through 1933, covering the jobber-contract indictment period (140-141).

After the Code went into effect the situation improved over 1933. The 1934 net earnings were $16,995.00 (140). The so-called margins were out of the picture after the Code became inoperative and Petitioner handled gasoline on a sort of stop-loss basis, under which it received 5.5¢ per gallon for gasoline handled by it.

Here even under defendant's theory there was no chance for the margin situation to obtain. Defendant was consis-

tently billing plaintiff at a price 5.5¢ under the retail price in Duluth.

The uncontradicted evidence is that a jobber could not live on this basis (150-157). Petitioner was already in a bad position because of the jobber contract and margin conspiracy (44, 51, 52) when the price-fixing conspiracy hurled another volley into Petitioner's business.

With the buying programs working (36-37) Petitioner was given another push toward extinction.

Regardless of what stop-loss arrangement the contract provided, the fact remains that the undisputed evidence did show an illegal exaction of 2¼¢ per gallon. Had this illegal exaction not been taken from Petitioner, had the prices not been fixed, had they been where they would have been but for the conspiracy, the stop-loss provision of the contract would never have become operative. In any event it is immaterial—it deals with something subsequent to the original wrong—something of "no concern to the wrongdoer."

In that year, 1935, Petitioner lost $1,348.00 (141) and in only three months in 1936 it lost $2,375.00, or nearly twice as much as it had lost in the whole year of 1935. The rate of loss was alarming and was increasing rapidly.

Manifestly, Petitioner *could not continue in business at this rate.* The *two* conspiracies were too much.

Petitioner had two causes of action—one under the jobber margin indictment and judgment and one under the price-fixing indictment and judgment.

Petitioner originally sought damages because of both conspiracies.

Before the trial Petitioner *elected to base its claim for damages on the 1935 and 1936 conspiracy* only. This related to price-fixing (37-38). The indictment in the price-fixing case, Madison Case No. 1, *did not charge any agree-*

ments or restrictions as to margins; it charged *price-fixing* (37-38). The matter of margins was not in the indictment nor the case as it was tried. Margins and jobber contracts were involved in the other indictment (44, 51, 52, 55, 57, 61) under which no claim was made at the trial.

To the weakened jobber the 1935 conspiracy was the *final push,* the proverbial last straw. It resulted in putting it out of business. The jobber, Petitioner, elected to proceed on the price-fixing conspiracy only, making no proof as to the jobber margin conspiracy or the plea of *nolo contendere* thereunder.

Petitioner, relying upon the price-fixing conspiracy and the doctrine of *Chattanooga Foundry Co. vs. City of Atlanta,* 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65; *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791, and *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, tried its case on the illegal exaction theory only.

The Circuit Court opinion says that Petitioner did not show what the prices *would have been* at Duluth, *but for* the illegal exaction, and hence could not recover.

This was not necessary on the theory upon which the case was tried and under *Chattanooga Foundry Co. vs. City of Atlanta, supra.* Further "the law does not go beyond the first step" *(Southern Pacific vs. Darnell, supra).*

If Petitioner had relied upon the margin theory in connection with the 1935 conspiracy and had sought recovery for loss of profits or margins from 1931 on, then, perhaps, it should have introduced evidence by an expert to show that had the illegal exaction not been made at Tulsa, and had the price Petitioner was compelled to pay been lower, the retail prices would still have remained where they were and Petitioner's profit or margin then would have been greater. But the margin question was not involved nor presented, nor were margins considered in the indictment in the price-

fixing case (36-37).

Petitioner chose the *simple, easy, direct method.* Petitioner *followed the rule laid down by this Honorable Court* that it could recover for the illegal exaction *(Chattanooga Foundry vs. City of Atlanta, supra).*

Petitioner did not believe that "pass on to the retailer" (254) *could possibly be a defense,* in view of the decisions of this Court in *Southern Pacific vs. Darnell* and *Adams vs. Mills, supra.*

The Circuit Court referred to statements by Secretary Friedman as to margins. Such statements made were immaterial and surplusage on the theory upon which the case was tried.

Conceding the fact that the jobbers were being injured by the conspiracy of 1931 and subsequent years as to uniform contracts, guaranteed margins, etc. (44, 51, 52), and conceding that Petitioner had been injured because of that conspiracy—all that *does not alter the fact that Petitioner was further injured* by the *buying programs,* exacting the illegal 2¼¢ per gallon from it (228-236).

What *would have happened* to the retail market in Duluth *but for* the illegal exaction, Petitioner did not show. *It did not have to.* As Justice Holmes said— "The law does not go beyond the first step." *Southern Pacific vs. Darnell, supra.*

Petitioner chose to show the illegal exaction under *Chattanooga vs. Atlanta, supra,* relying upon the *Adams vs. Mills,* and *Southern Pacific vs. Darnell,* cases as *eliminating* any such *defense* as "passed on to the retailer" (254).

STOP-LOSS PROVISION

The exclusive franchise contract contained a *stop-loss* provision. This provided that in no event would Petitioner's margin be less than 5.5¢ per gallon. Out of this Petitioner had to pay its resellers from 3¼ to 4 cents per gallon (171).

This stop-loss figure did not guarantee a profit nor provide a "living margin" (150-151). It is merely mentioned in passing, as it in no way affected or lessened the illegal exaction of 2¼ cents per gallon.

The Circuit Court overlooked the basic fact that Petitioner's claim was founded upon the illegal exaction. The contract provisions constituted no more of a defense than the "passed on to the retailer" idea did. The District Court directed a verdict on the "passed on to the retailer" theory (254) and *not* because of the stop-loss clause.

The liability accrued when the illegal exaction was made under the rule of *Chattanooga Foundry Co. vs. City of Atlanta, supra.* The stop-loss provision could only come into consideration *after* the illegal exaction of 2¼¢ had been made. This constituted no defense any more than "passed on to the retailer" constituted a defense, in view of the decisions in *Southern Pacific vs. Darnell* and *Adams vs. Mills, supra.*

This Court has directly held, in a case which has never been reversed or criticized, that a purchaser could recover damages because of an *excessive charge* made by reason of *a violation of the Sherman Act.* The following quotation is all sufficient:

> "Where a combination of sellers *caused prices* of certain piping to a city *to be raised, in violation of the Sherman Anti-Trust Law,* the City could *recover* the excess."
>
> *Chattanooga Foundry Co. vs. City of Atlanta, supra.*

To the same effect is the leading case of *Straus vs. Victor Talking Machine Company,* 297 Fed. 791. In that case the Court said:

> "In the case at bar, plaintiffs *have not sued* for damages due to *loss of profits.* Their position is that they were *entitled to buy goods in a free market;* that they were *prevented* from doing this by defendants' *illegal combination;* that they were *forced,* therefore, *to buy in the market which defendants had created,* and were thus compelled *to pay more* for their goods than the price which in that market was the fair and reasonable price. * * *"

The Court also said:

> "Whether, then, plaintiffs sold to their customers at a *profit* or *loss* becomes immaterial in this case. They were entitled to goods at the *reasonable price* thereof. Through no legal fault of theirs, but *because of defendants' wrong,* they were deprived of their *right,* and the jury could find that such deprivation defined in money was the difference between the established reasonable price and the amounts plaintiffs were *compelled to pay.*"

The Straus case *was specifically referred to and approved by this Court* in the later case of *Story Parchment Company vs. Paterson Parchment Paper Company,* 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248, the *leading case in the United States on liberality as to proof of damages* under the Sherman Act.

The rule is definitely established by this Court that one who pays an *illegal exaction because of a conspiracy in violation of the Sherman Anti-Trust Law can recover the excess.* This is the specific holding of this Court in *Chattanooga Foundry Co. vs. City of Atlanta, supra.* (The Circuit Court did not mention this case in its opinion.)

LIBERAL RULE AS TO DAMAGES

The Circuit Court of Appeals in its opinion in the present case *did not even mention*, although the case was stressed in that Court and in the printed briefs, the case of *Story Parchment Company vs. Paterson Parchment Paper Company*, 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248, following the early case of *Eastman Kodak Company vs. Southern Photo Material Co.*, 273 U. S. 365, 71 L. Ed. 684, 47 S. Ct. 400. The Story Parchment Case is the *leading case* in the United States on the *liberal rule* of damages under the Sherman Act.

The opinion in the Story Parchment Company Case was by Mr. Justice Sutherland, who said:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages *with certainty*, it would be *a perversion of fundamental principles of justice* to deny all relief to the *injured* person, and thereby relieve the *wrongdoer* from making any *amend* for *his* acts. In such case, while the damages may not be determined by mere speculation or guess, *it will be enough* if the evidence show the extent of the damages as a matter of just and reasonable *inference, although the result be only approximate.* The *wrongdoer* is not entitled to *complain* that they cannot be measured with the *exactness* and *precision* that would be possible if the case, which he alone is responsible for making, were otherwise."

He also quoted with approval this language:

> "* * * the *facts* and *circumstances tending* to show the *probable* amount of such damages should be *submitted to the jury* to enable them *to form* * * * *such reasonable and probable estimate*, as in the exercise of good sense and sound judgment they shall think will produce adequate compensation."

The Circuit Court, as appears from the opinion, was attempting to *justify* the action of the trial judge in directing a verdict, saying: "We find that the record fully *supports* the statements of the trial court and its action in sustaining defendant's motion for a directed verdict" (342).

The Circuit Court proceeded upon a wrong idea. The question in the case was whether there was any evidence as to damages to be considered *by the jury.* Had there been a jury verdict, then the question might have been whether there was *support* for its verdict. It is not a question of *support* for the position of the trial court. The question is one of *support* for leaving the issue to the jury and the Circuit Court was wrong in holding that because the action was for "triple damages" (343), "necessary definiteness" was "immediately" suggested (343).

We invite a *comparison* of the language of the Circuit Court with the following language used by Mr. Justice Sutherland in the Story Parchment Case, *supra:*

> "The constant tendency of the courts is *to find some way in which damages can be awarded* where a *wrong* has been done. *Difficulty of ascertainment* is *no longer* confused with right of recovery."

REQUIRING TOO MUCH OF PLAINTIFF

In *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791, it was said "that the Court *cautiously required plaintiffs to prove perhaps more than was necessary."* This has been surprisingly true of many *lower* courts. They have *required too much* of plaintiffs but *have been consistently reversed by the Supreme Court* in such cases as *Ramsay vs. Associated Billposters,* 260 U. S. 501, 67 L. Ed. 368, 43 Sup. Ct. 167.

They have *required too much* in the way of *pleading,* and have been reversed in such cases as *Stevens vs. Foster,* 61 S. Ct. 210, decided December 9, 1940.

See also as to no "technical nicety" as to pleading, *Holiday vs. Johnston,* decided May 26, 1941, 61 Sup. Ct. 1015.

The following quotation is from a case which had a stormy and unsuccessful career in all *lower* courts; Mr. Justice McReynolds, speaking for the Supreme Court, said:

> "The *fundamental purpose* of the Sherman Act was to secure equality of opportunity and to *protect* the public against evils commonly incident to *destruction of competition* through *monopolies* and *combinations in restraint of trade.* The alleged actions of defendants are *directly opposed* to this *beneficent purpose* and are *denounced* by the statute."
>
> *Charles A. Ramsay Co. vs. Associated Billposters, supra.*

In the Ramsay Cases, *supra,* after a long journey through the courts, it was finally held in *one* of the cases that *proof of damages* sufficiently appeared, for the jury, at least, where the plaintiff was "content to leave the matter on proof of earnings, expenses and net profits *before* the defendant's unlawful acts." In the other case (two cases being considered together), *estimates* as to damages were made. *Both* theories or methods of proof were objected to, but *both* were upheld. *Rankin vs. Associated Billposters,* 42 Fed. (2d) 152. This is the *same case* which appears as *Ramsay vs. Associated Billposters,* 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167.

Certiorari was denied in *Rankin vs. Associated Billposters,* 42 Fed. (2d) 152. See 282 U. S. 864, 75 L. Ed. 765.

It appearing, therefore, that under the existing law there can be no dispute as to the following:

(a) That where there *is* an illegal exaction because of a violation of the Sherman Act, there *can be* a recovery;

(b) That an exceptionally *liberal rule* as to damages applies in cases under the Sherman Act.

In directing the verdict in the court below the trial court used language which the *Circuit Court* of Appeals *omitted* in its opinion; although *quoting* language used by the trial court *from which the error of law was less plain.*

We quote what the trial court said in directing a verdict, this being the language which the Circuit Court of Appeals did *not* quote in its opinion:

> "It is *uncontradicted* in the evidence that the price of gasoline to the *jobber as a result of this conspiracy was increased*" (bottom p. 253).

The Circuit Court *did* quote language appearing at the bottom of page 254 and the top of page 255 containing the words, "Lessened margins," etc.

The trial court also said, but the Circuit Court did not quote it:

> "This has been a difficult case * * *. The Court may be *wrong.* * * * If I am *wrong,* there is of course another Court that *can correct this Court* and *set me right* in so far as the law is concerned" (255).

But the *doubt was resolved in favor of the wrongdoer* and *against* the *wronged,* contrary to *Local 167 vs. United States,* 291 U. S. 293, 78 L. Ed. 804, 54 S. Ct. 396, and *Story Parchment Company vs. Paterson Parchment Paper Co., supra.*

PASSED ON TO THE RETAILER

Is it a complete defense to say that the *illegal exaction* could be "passed on to the retailer"? (254.) The trial court said "Yes" (254). The Circuit Court said it was fully "*supported*" (342).

This Court should grant a writ to the end that that question might be determined. It has never been directly determined in a case involving the Sherman Act, but the rule

has been laid down under a like statute and that rule is *contrary* to the Circuit Court's opinion.

This Court, in an opinion by Mr. Justice Holmes, said:

> "The *only* question before us is that at which we have hinted; *whether the fact that the plaintiffs were able to pass on the damage* that they sustained in the *first instance* by paying the unreasonable charge, and to *collect* that amount *from the purchasers, prevents* their recovering the *overpayment* from the carriers. The answer is not difficult. *The general tendency of the law,* in regard to damages, at least, *is not to go beyond the first step.* As it does not attribute *remote* consequences to a *defendant,* so it holds him *liable* if *proximately* the plaintiff has suffered a *loss.* The *plaintiffs* suffered *losses* to the amount of the verdict *when they paid.* Their claim *accrued at once in the theory of the law,* and it does *not inquire into later events.*"
>
> *Southern Pacific vs. Darnell,* 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186.

In a later case the Court in an opinion by Mr. Justice Brandeis said:

> "The defendants contend that *even if* the exaction of the extra 25-cent charge *was unlawful,* the plaintiffs are not entitled to recover. The argument is that under Section 8 of the Interstate Commerce Act the liability of the common carrier is 'to the person or *persons injured thereby* for the *full amount of damages* sustained *in consequence of* any such violation'; that before any party can recover under the Act he must show *not merely the wrong* of the *carrier,* but that the *wrong has in fact operated to the plaintiff's injury;* that here the award is to the plaintiffs individually, not as agents for the shippers; and that individually they suffered no *pecuniary* loss, since they paid the charges as *commission merchants* and *reimbursed themselves* for these, as for other, charges from the *proceeds of the sale* of livestock, remitting to their principals only the *balance* remaining. We think the argument *unsound,* for the

reasons, among others, stated in *Southern P. Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 62 L. Ed. 451."

Adams vs. Mills, 286 U. S. 397, 76 L. Ed. 1184.

In the Adams Case, Justice Brandeis further said:

"In contemplation of law the *claim for damages arose at the time the extra charge was paid.*"

He also said:

"Neither the fact of *subsequent reimbursement* by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, *is* of *any concern to the wrongdoers.*"

The *Adams vs. Mills* and the *Southern Pacific vs. Darnell* Cases have never been reversed and never departed from.

The Circuit Court of Appeals, to uphold its statement that "the record fully *supports* the statements of the trial court" —and be it remembered that the trial court said that because the increase was "passed on to the retailer" (254), there could be no recovery—took the position that the doctrine of the *Adams vs. Mills* and *Southern Pacific vs. Darnell* Cases did not apply because the Interstate Commerce Statute was *different* than the Sherman Act (342-343).

The Court also made the startling distinction that the damages in *Southern Pacific vs. Darnell* were "definitely and specifically *found by* the *commission* in its order" (343).

Had a *jury*, the tribunal to try *questions of fact* in this country, been permitted to pass upon the question, *it* undoubtedly would have "definitely and specifically *found*" some amount of damages. The degree of definiteness *does not vary with the tribunal finding the amount.*

The Circuit Court also said (speaking of *Adams vs. Mills*): "The unlawful charges paid are definite and *responsive to the provisions of the Act.*" Just what is meant by

the words italicized, we do not know, but we assume that any damages under the Sherman Act would be *"responsive* to the provisions of the Act," the *same* as under the Interstate Commerce Act.

But the Circuit Court goes further and makes the statement as to the Sherman Act: "This statute *differs materially* in its *provisions* from those of the Interstate Commerce Act, which *insure* definite and specific recoveries."

We are not so sure about the word, "insure." We touch on the question of definiteness and specific recoveries later, but now let us examine the statutes.

THE TWO STATUTES ARE SIMILAR

We quote the applicable provisions side by side below:

Interstate Commerce Act.	**Sherman Act.**
Liability in damages to persons injured by violation of law—	Suits by persons injured; amount of recovery—
In case any common carrier subject to the provisions of this chapter *shall do, cause to be done, or permit to be done any act*, matter or thing in this chapter *prohibited* or *declared* to be *unlawful*, or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier *shall* be *liable* to the person or persons *injured* thereby for the *full amount* of *damages* sustained in consequence of any such violation of the provisions of this chapter, together with a *reasonable counsel* or *attorney's fee, to be fixed by the court* in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.	Any person who shall be *injured in his business or property* by reason of anything *forbidden* in the anti-trust laws may sue therefor in any district court of the United States * * * and shall recover *threefold* the *damages* by him sustained, and the cost of suit, including a *reasonable attorney's fee.*
Title 49, U. S. C. A., Sec. 8, Title 49, Sec. 8, *Mason's United States Code.*	Title 15, U. S. C. A., Sec. 7, Title 15, Sec. 15, *Mason's United States Code.*

A reading of the statutes answers the Circuit Court. Ar-

gument is hardly necessary. The Interstate Commerce Act allows recovery to the persons injured to the *full amount* of damages. The Sherman Act allows damages to a person injured "in his business or property," and instead of the *full amount* allows *threefold* damages.

If the right of action under the Interstate Commerce Act is *broader* and *greater* than under the Sherman Act, the Bar should be so told. If anything, recovery should be *broader* under the *Sherman Act.* A *conspiracy* is certainly *more heinous* than a *mere rate overcharge* or a rebate. There would be little logic in saying that under the *milder* Interstate Commerce Act, as stated by Mr. Justice Holmes, "the law does not go *beyond the first step,*" but that under the severe Sherman Act, where the recovery arises because of a *conspiracy to violate the laws of the United States,* damages must be shown with *greater definiteness* and *precision.* As an *original proposition* this would be wrong without any guiding decisions. But we have the Story Parchment Case, laying down a very liberal rule as to damages in Sherman Act Cases, not "the necessary definiteness" required by the Circuit Court.

The Circuit Court says that the fact that triple damages are sought "immediately suggests necessary definiteness in the basis of damages."

The Eastman Kodak Case and Story Parchment Case, *supra,* hold that definiteness and certainty are *not* required.

DARNELL RULE NOT BASED ON INTERSTATE COMMERCE ACT

The Circuit Court of Appeals held the Darnell Case inapplicable because it construed the Interstate Commerce Act —a statute "materially different" (?) from the Sherman Act.

Mr. Justice Holmes based the Darnell decision on the case of *Olds vs. Mapes-Reeve Construction Co.,* 177 Mass. 41-44, 58 N. E. 478. That was a case involving damages for an alleged breach of contract for putting up a building and had nothing to do with any so-called fixed losses, as held by the Circuit Court to be the case in actions under the Interstate Commerce Act.

In *Olliphant vs. Florida East Coast Car Ferry Co.,* 4 Fed. Supp. 288, the Court said:

> "The situation here is the same in principle as where an injured party recovers damages from a wrongdoer, as, for instance, for personal injuries, notwithstanding the injured party may be also indemnified by insurance. That the injured party is so indemnified is no concern of the wrongdoer, and no defense in an action for the tort."

RATE OF OVERCHARGE IN CASE NOT INVOLVING INTERSTATE COMMERCE ACT BUT SHERMAN ACT

A rate case—a shipping case under the Sherman Act (not the Interstate Commerce Act)—in which there *was* an *overcharge* and in which it was held that the *mere fact of the overcharge,* where there was *a conspiracy* to violate the Sherman Law, gave rise to a cause of action is *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353.

In that case the Court said:

> "It is, however, contended that *even if* it be assumed the facts show an *illegal combination, they do not show injury* to the plaintiffs by reason thereof. The contention is *untenable.* Section 7 of the act gives a cause of action to any person *injured* in his person or property by reason of anything forbidden by the act, and the right to recover threefold the damages by him sustained. The plaintiffs alleged a *charge over a reasonable rate* and the *amount* of it. If the charge be *true* that *more than a reasonable rate was secured* by the

combination, the *excess* over what was reasonable *was an element of injury.*"

Thomsen vs. Cayser, supra.

The recovery for an *illegal rate exaction* was *allowed, not* under the Interstate Commerce Act, but under the Sherman Act.

The *basis* for the allowance, the illegal overcharge, due to the conspiracy, therefore, was *established* by Petitioner. That being so, does the *defense* of "passed on to the retailer" (254) allow defendant to escape? This Court has said *not.* (See *Southern Pacific vs. Darnell* and *Adams vs. Mills, supra.*)

In *Thomsen vs. Cayser* the Court also took the position, generally, that it appeared that *somehow, somewhere* plaintiff had a cause of action, that it *relied upon certain decisions* of the Court, which it had a right to do, and the Court refused to permit judgment to go in favor of the wrongdoer, Mr. Justice McKenna, saying: "It would be unjust to permit the plaintiff to go unshorn of justice."

Little need be said regarding the statement of the Circuit Court: "The *mere fact* that the existence of a *conspiracy* to raise prices is established is not sufficient *ipso facto,* to support a judgment for damages under the Sherman Act." *Petitioner did not claim it was.*

Petitioner showed the following:

(a) A substantial business running from $150,000.00 to over $300,000.00 a year from 1922 to 1936, when defendant "took" (143) Petitioner's property;

(b) Substantial gross profits during all of those years;

(c) Substantial net profits during practically all of those years except the period covered by the price fixing conspiracy;

(d) That Petitioner was forced out of business; that Re-

spondent "took" (143) its property valued at over $100,000.00 (149), giving it $45,000.00 therefor (159);

(e) That Petitioner received nothing for its good will, built up since 1922 (159);

(f) That Petitioner sold 1,700,000 gallons of gasoline and paid an illegal exaction, due to the conspiracy, of 2¼¢ per gallon for such gasoline;

(g) That Petitioner had a business from which the main stockholders, Friedman and Lubratovich, were drawing substantial salaries, all of which was lost (139).

All of the above *facts* were shown *without dispute* and amount to *more* than a *mere proof* that the Respondent had been *convicted* of a *conspiracy*. *Damages appeared* and were *clearly shown*.

Incidentally, it might be noticed that the Circuit Court mentioned "the *existence* of a conspiracy to raise prices." The conspiracy to raise prices not only "existed" but it was *carried into effect*.

> "In this case, the *result* was to place *a floor under the market*—a *floor* which served the function of increasing the stability and firmness of market prices."
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> *United States vs. Socony-Vacuum*, 84 L. Ed. 1129, p. 1168, 310 U. S. 150, p. 223, 60 S. Ct. 811, p. 844.

> "Proof that a *combination was formed* for the purpose of *fixing prices* and that it *caused them to be fixed* or contributed to that result is proof of the *completion* of a price-fixing conspiracy under Section 1 of the Act. The indictment in this case charged that this combination had that purpose and effect. And there was *abundant evidence* to support it."
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> *United States vs. Socony-Vacuum, supra.*

LOWER COURTS AT VARIANCE WITH SUPREME COURT

We invite a close study and scrutiny of the following table of cases under the Sherman Anti-Trust Law and the Interstate Commerce Act.

TABLE OF CASES

Title of Case	Decision of Lower Court	Decision of U. S. Sup. Court	Date
Ramsay vs. Associated Billposters, 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167	Judgment for Defendant Wrongdoer	Reversed	Jan. 2, 1923
U. S. vs. Socony-Vacuum Co., 60 S. Ct. 811, 310 U. S. 150, 84 L. Ed. 1129	Defendants let out in criminal case	Reversed	May 6, 1940
Southern Pac. R. R. vs. Darnell-Taenzer, 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451	(Interstate Commerce Act.) Judgment for Defendant Wrongdoer	Reversed	Jan. 21, 1918
Adams vs. Mills, 286 U. S. 397, 52 S. Ct. 589, 76 L. Ed. 1184	Judgment for Defendant Wrongdoer (Interstate Commerce Act)	Reversed	May 23, 1932
Stevens vs. Foster, 61 S. Ct. 210	Judgment for Defendant Wrongdoer	Reversed	Dec. 9, 1940
U. S. vs. Borden Milk Co., 60 S. Ct. 182, 308 U. S. 188, 84 L. Ed. 181	Judgment for Defendant Wrongdoer	Reversed	Dec. 4, 1939
Thomsen vs. Cayser, 243 U. S. 66, 61 L. Ed. 597, 37 Sup. Ct. 353	Judgment for Defendant Wrongdoer	Reversed	Mar. 6, 1917
Story Parchment vs. Paterson Parchment Co., 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544.	Judgment for Defendant Wrongdoer	Reversed	Feb. 24, 1931
Indiana Guide Pub. Co. vs. Prairie Farmer Pub. Co., 293 U. S. 268, 79 L. Ed. 356, 55 Sup. Ct. 182	Judgment for Defendant Wrongdoer	Reversed	Dec. 3, 1934

The cases above mentioned speak eloquently not only of the *trend* of the decisions but of the *positive adjudications*

that *wrongdoers* cannot escape the *penalty* for their *wrongs* under the Sherman Act any more than they can under the Federal Safety Appliance Act. (See *Texas & Pac. Ry. vs. Rigsby*, 36 S. Ct. 482, 241 U. S. 33, 60 L. Ed. 874.)

CIRCUIT COURT FAILED TO NOTICE CASES

Other than the case of *United States vs. Socony-Vacuum* in which the Respondent herein was convicted, the Circuit Court only mentioned *two* of the cases cited in the table —*Southern Pacific vs. Darnell*, and *Adams vs. Mills*, and utterly failed in attempting to show the rule of those cases to be inapplicable to the facts in the case at bar.

Nothing was said by the Circuit Court about the liberality in the matter of pleadings, as appears from *Stevens vs. Foster*, 61 S. Ct. 210 (see subsequent case of *Holiday vs. Johnston*, 61 Sup. Ct. 1015), nor the liberality as to damages in the Story Parchment Case and *Ramsay vs. Associated Billposters* nor the "rate" case under the Sherman Act—*Thomsen vs. Cayser*.

Nor was anything said about the tendency being *to find some way* in which to *award damages*. (Story Parchment Case.)

Nor was anything said about the liberality of the New Rules or treating the pleadings as amended to conform to the evidence (Rule 15c).

Neither was anything said about the Minnesota rule that where it appears that upon some theory plaintiff had a cause of action judgment should not be granted against it. This is the rule in *Cruikshank vs. St. Paul Fire & Marine Ins. Co.*, 75 Minn. 266, 77 N. W. 958. This case was called to the Court's attention with the suggestion that in view of the state rule there might be an applicability of the doctrine of *Erie Ry. vs. Tomkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817.

PLEADINGS, STIPULATION, MARGIN

Originally *two* judgments were involved as a basis for recovery in this civil action. One was the judgment in the so-called *Jobber contract case,* which is referred to as Madison Case No. 2. The indictment in that case is found at page 44 of the record and charges a conspiracy "to regulate, and to fix and make uniform the amounts of guaranteed margins to be allowed to jobbers" (44, 51-52).

The other indictment, the one under which the case was tried, involved price-fixing only (25, 36-37).

By stipulation and pleadings the parties simply agreed to *eliminate the margin case* and try the case on the *price-fixing* conviction. The complaint was sufficiently broad to permit this.

The *purpose* of the stipulation was *to eliminate Madison Case No. 2,* the Jobber contract case, or margin case, from consideration, *not* to *hamper* Petitioner in its proof as to Madison Case No. 1.

The Stipulation provided:

> "Plaintiff may offer evidence that the *conspiracy* as to which the judgment is *prima facie* evidence, *proximately injured plaintiff*" (paragraph 4, page 86 of the record).

Clearly under the liberality permitted by the New Rules this did not limit plaintiff to "margins." While the term, "margin," was used in the Stipulation, the complaint was broad enough to allow proof of the illegal exaction (70-71, 72, 73), which was the intention of the parties.

NO OBJECTION AS BEYOND STIPULATION

The parties specifically reserved, by paragraph 7 of the Stipulation (88), *the right to make any objection* as to any *offer* or *proof* of *evidence*. It was provided that the Stipulation "shall not be construed as a *waiver* by any party of any *objection* to the admissibility of any proof or matter as evidence" (88).

Defendant *might have objected*, although we do not think the objection would have been proper, to the evidence as to the effect of the "floor" and the *effect* of the *price fixing and buying programs*, as testified to by John Cox (228-236).

Defendant *might have* said that that testimony was inadmissible, as *beyond the terms of the Stipulation. It did not do so* (112, 113, 114, 228-236).

A TECHNICAL STRAW

The defense that the Stipulation, in effect, eliminated *all* the allegations of the complaint (70-71) (76-77) is a sort of grasping at a highly technical straw in an attempt by defendant to save itself from the effect of the judgment in Madison Case No. 1, which "*proximately injured* plaintiff" (quotation from paragraph 4 of Stipulation, p. 86) and to get away from the fact "that there was a *causal connection between such conspiracy and the damages claimed to have been sustained by plaintiff*" (quotation from paragraph 4 of the Stipulation, page 86 of the record).

AMENDMENT OF PLEADINGS

Paragraph 22 of the *original* complaint contained an allegation that the prices did *not* rise at Duluth proportionately with the rise at Tulsa. The *new* paragraph 22 *eliminated* this word, "proportionately," and charged (72-73) "that the

basic price of gasoline, f. o. b. Group III, was so *fixed* by defendants and by reason of the conspiracy" "*that plaintiff was damaged in the sum of approximately two cents (2¢) per gallon for each gallon* of gasoline," etc. (72-73). Certainly this was sufficient to show the illegal exaction, especially under the New Rules as to Pleadings. That Respondent *thought so* is evident from the fact that *no objection was made* to the testimony of John Cox (228-236) nor to the final judgment of conviction (112, 113, 114, 228-236). (See as to Respondent's idea *Holiday vs. Johnston*, 61 Sup. Ct. 1015, in view of fact no objection was made to plaintiff's proof (228, 236).)

It was plaintiff's idea that there was still some marginal injury, in the most technical and strict sense, because the rise at Duluth and Tulsa were not always timed the same (145, 207). But plaintiff did not try the case on that theory.

Paragraph 16 of the complaint made a *direct charge* of an *increase* and *fixing* of tank car prices (71).

To justify its position that this was *wholly* a margin case, the Circuit Court quoted a colloquy between the trial court and counsel, relative to the amendment of the complaint, but *did not quote* that portion of the colloquy *favorable* to the Petitioner:

> "Mr. Michel: That is *one* thing, yes.
>
> The Court: And what is the *other* claim?
>
> Mr. Michel: That they were stabilized—that they *stayed there*—stayed *too high—should have been lower.*"
>
> The Court asked: "If the margins were stabilized, how were you damaged?" And then this occurred:
>
> "Mr. Michel: Because they should have been *lower. We could not buy in the kind of a market that we should have been.* (Citing cases.) We say there was damage in *both* ways—they *fixed them and they raised them.* That is our claim, your Honor, and that has been the way it has been all the way through—that they raised

and fixed them. You will find that here in other allegations" (105).

Then the following occurred, and it was *not* quoted in the opinion:

"The Court: Well, do you contend that you can show some *causal relationship* between the *stabilization of prices and damage to your business?*

Mr. Michel: *Yes, we do,* and that is what we want to do here. That is the purpose of this amendment. We feel we should be entitled to do that under the circumstances.

The Court: In other words, you contend that *both elements* are to be considered in so far as damage is concerned?

Mr. Michel: Yes" (106).

We particularly call attention to the word, "*both*," used on page 106. And all this the Circuit Court does not quote but *does* quote some more restrictive language.

While it is true the word, "margins," again crept into the case it is clear that both elements (106) were to be considered.

Further, *the colloquy is not the pleading.* It may have been a *reason* for the *amendment,* but it is *not the pleading.* And the amendment was not necessary. Paragraph 16 of the complaint (70-71) was amply broad and sufficient to permit evidence that defendant sold Petitioner at artificially fixed prices. Further, the evidence was received without objection (228-236).

At folio 105 the words "(citing cases)" appear. *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791; *Chattanooga Foundry Co. vs. City of Atlanta,* 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65, and *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 Sup. Ct. 353, were relied upon below. These are the "citing cases." This was the reliance of Petitioner.

The claim, then, was not "margin," but being forced to buy in a closed market, created and held by the conspiracy.

NO OBJECTION AS TO PLEADINGS OR STIPULATION

The *pleadings* control in the *first instance*. Secondly, *regardless of pleadings*, the *evidence* was received *without objection*.

> "When issues *not raised by the pleadings* are tried by express or *implied consent* of the parties *they shall be treated in all respects as if they had been raised in the pleadings.*"
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> Rule 15, Sub-division (b), Rules of Civil Procedure for the District Courts of the United States.

Pleadings are not to be so *technically* construed as to defeat a plaintiff's right to a trial by jury, where defendant has been adjudged guilty of a conspiracy to violate the laws of the United States. See Rule 8, Sub-division (e), Section 1, Rules of Civil Procedure for the District Courts of the United States.

> "All pleadings shall be so construed as to do substantial justice." *Ibid.*, Sec. f.
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> (See *Holiday vs. Johnston*, 61 Sup. Ct. 1015.)

CONCLUSION

The questions here presented are too important to be left unsolved or to be "solved erroneously," as was done by the Circuit Court.

The opinion of the lower court stands out as, and it is, *wholly inconsistent with practically everything this Court has decided in civil actions under the Sherman Act*, and it certainly is *inconsistent* with and makes a most weak distinction of the cases of *Southern Pacific vs. Darnell* and *Adams vs. Mills, supra.*

On the mere face of this Petition for Certiorari, plus a reading of the opinion of the Circuit Court, enough appears for a reversal.

Certainly ample grounds appear for a hearing on the important questions involved, which this Honorable Court has not heretofore directly passed upon.

The decision of the Circuit Court would not be correct if it dealt with original propositions.

It is wrong because in conflict with many decisions of this Court on like questions.

The precise questions, as pertaining to the Sherman Act and the Madison conviction should be determined by this Court, that the error of the Circuit Court be corrected.

Respectfully submitted,

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